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IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eleventh Amendment bar suit against a political subdivision of a state simply because the entity possesses powers of government?

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PETITION FOR A WRIT OF CERTIORARI

Comes now Ysleta del Sur Pueblo, a federally recognized Indian tribe, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on April 10, 2000, Appendix at 15a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

Neither the order of the United States District Court for the Western District of Texas dismissing the case on jurisdictional grounds, Appendix at 1a, nor the opinion of the Court of Appeals affirming dismissal, Appendix at 17a, are reported.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of a Foreign State.

Tex. Const. art. 16 § 59(b): [Conservation and reclamation districts] shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions . . . as may be conferred by law.

STATEMENT OF THE CASE

The Pueblo brought suit in federal court to eject El Paso County Water Improvement District No. 1 ("EPCWID") from real property occupied by EPCWID's administrative office and service yard. The Pueblo alleged legal title to the property pursuant to a 1751 grant from the Kingdom of Spain as well as an aboriginal right to possess the property, both the fee interest and usufructuary right being inalienable under the Indian Non-Intercourse Act, 25 U.S.C. § 177. EPCWID is a political subdivision of the State of Texas, organized under section 59(b) of Article 16 of its Constitution.

The District Court dismissed the Pueblo's suit for lack of jurisdiction. Appendix at 14a. The District Court first determined that the Eleventh Amendment barred the Pueblo's claims if asserted against the state. The District Court then

found that Texas is the real party in interest in this suit. The District Court acknowledged the existence of the Fifth Circuit's six-factor test to determine whether the state is the real party in interest in a lawsuit brought against an agency of the state. The District Court did not apply the test, however, finding that the "bright-line" test established in *Pillsbury Co. v. Port of Corpus Christi*, 66 F.3d 103, 104 (5th Cir. 1995), cert. denied, 517 U.S. 1203 (1996), mandates that entities created and operating pursuant to section 59 of article 16 of the Texas Constitution, such as the EPCWID, be accorded Eleventh Amendment immunity. Appendix at 14a.

Citing its decision in *Pillsbury* at 104, and its decision in *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983), the Court of Appeals affirmed the order of the District Court. Appendix at 18a.

ARGUMENT

The Fifth Circuit's "bright-line" test—that a political subdivision of the state which possesses powers of government also enjoys Eleventh Amendment immunity—is contrary to the decisions of this Court, other circuits, and its own precedents.

Although the Eleventh Amendment bar encompasses actions against state instrumentalities, courts must first decide as a matter of federal law whether a particular entity has the same kind of independent status as a county or is instead an arm of the state. *Regents of the University of California v. Doe*, 519 U.S. 425, 429-430 (1997). The Fifth Circuit developed a six-factor test in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), to determine whether an entity is the alter ego of the state:

> (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity

> enjoys; (4) whether the entity is concerned primarily with local, as opposed to state-wide problems; (5) whether the entity has authority to sue and be sued in its own name; and, (6) whether the entity has the right to hold and use property.

See *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901, 906 (5th Cir. 1987)(citations omitted).

Applying the *Jacintoport* test to EPCWID in the same manner as applied by the Fifth Circuit to the Board of Mississippi Levee Commissioners in *McDonald* demonstrates that EPCWID is less entitled to the Eleventh Amendment immunity which was denied the Board in the Mississippi case. The Fifth Circuit refused to apply the *Jacintoport* test, however, because of the "bright-line" test it previously established in *Pillsbury*.

The decision in *Pillsbury* "reaffirmed" the holding in *Kamani* that entities created under section 59 of article 16 of the Texas Constitution are entitled to Eleventh Amendment immunity.[1] The Court based its decision in *Kamani* on its prior description of an entity created under section 59 as "a creature of state law and a political subdivision of the State of Texas." See *McCrea v. Harris County Houston Ship Channel Navigation District*, 423 F.2d 605, 607 (5th Cir.), cert. denied, 400 U.S. 927 (1970).[2] The statement is a truism shedding no light on Eleventh Amendment issues.

The Texas Supreme Court had previously determined that an entity existing and operating under section 59 "is a governmental agency and body politic, governed by the laws applicable to counties." *Bennett v. Brown County Water Improvement District No. 1*, 272 S.W.2d 498, 502 (Tex. 1954).

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[1] The issue in *Kamani* was whether plaintiff complied with the notice provision of the Texas Tort Claims Act. See 702 F.2d at 615-616.

[2] The issue in *McCrea* was whether defendant was a "common carrier by railroad" as defined by the Federal Employers Liability Act. See 423 F.2d at 606.

The Texas Supreme Court went on to hold that the water district is immune from suit in state court because counties in Texas enjoy such immunity. *Id.* at 502. The Eleventh Amendment, however, does not bar suits against the counties of Texas. See *Crane v. Texas*, 759 F.2d 412, 415-416 (5th Cir.), amended on denial of rehearing, 766 F.2d 193 (5th Cir.), cert. denied, 474 U.S. 1020 (1985). The Fifth Circuit's "bright-line" test is in error because powers of government, such as sovereign immunity, is but one of many factors used in determing whether an entity is an arm of the state. Cf., *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999) (the fact that a school district is entitled to state sovereign immunity does not determine extent of Eleventh Amendment immunity).

The decision of the Fifth Circuit permits States to shield their political subdivisions from action in federal court for violation of federal law merely by ascribing "powers of government" to the entities. Form, not substance, becomes the touchstone of the Eleventh Amendment immunity. The "bright-line" test does nothing to protect the sovereign interests of states, but instead frees their political subdivisions to trample the federal rights of their citizens by shutting the doors to the federal courthouse.

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

[Filed Nov. 16, 1998]

P-98-CA-27

YSLETA DEL SUR PUEBLO

v.

EL PASO COUNTY WATER
IMPROVEMENT DISTRICT No. 1

ORDER DISMISSING CASE ON ELEVENTH AMENDMENT GROUNDS

BEFORE THE COURT in the above-captioned cause of action is Plaintiff's Motion for Order on Eleventh Amendment and Other Immunity Issues, filed September 23, 1998, Defendant's Response, filed October 5, 1998, and Plaintiff's Letter Brief in Reply to Defendant's Response, filed October 8, 1998. After due consideration, the Court is of the opinion that Plaintiff's claim should be dismissed for lack of jurisdiction.

Factual and Procedural Background

The Plaintiff, the Ysleta del Sur Pueblo ("Tribe"), a federally recognized Indian tribe, seeks to eject El Paso County Water Improvement District No. 1 ("EPCWID") from property EPCWID possesses in the present day Ysleta and Socorro Grants in El Paso County, Texas and seeks damages resulting from EPCWID's alleged trespass on such property.

The Tribe filed its Complaint on March 11, 1998, asserting that the Tribe is rightfully entitled to possess the subject property based on a 1751 Spanish Grant and a prior aboriginal right of possession. The Tribe alleges that neither the Kingdom of Spain, its successor the Republic of Mexico, or the Republic of Texas ever terminated the Tribe's legal title in any of its lands or its aboriginal right to possess its lands. Further, the Tribe claims its legal title and aboriginal rights are protected by the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922 and the Trade and Intercourse Act, ch. 33, 1 Stat. 137 ("the Indian Non-Intercourse Act"), as amended. Through various Relinquishment Acts, the State of Texas relinquished the subject properties to the people of the towns of Ysleta and Socorro, respectively.

Defendant El Paso County Water Improvement District No. 1 acts as an agent of the State of Texas in handling individual contracts between water users and the United States and to levy taxes and assessments on lands involved in the Rio Grande Reclamation Project, and was organized in accordance with the general laws of Texas and pursuant to Article XVI, section 59 of the Constitution of the State of Texas. (Defendant's Original Answer ¶¶ 45-47.) EPCWID contends that the Tribe was not a federally recognized Indian tribe prior to 1968 and that non-Indian land is the subject of this litigation. Consequently, EPCWID denies that the Indian Non-Intercourse Act, federal Indian common law, or the Treaty of Guadalupe Hidalgo apply to this case. EPCWID denies that the Tribe is entitled to possess the subject property, whether under a 1751 Spanish Grant or any alleged prior aboriginal right of possession.

EPCWID claims that it is a political subdivision of the State of Texas and as such possesses sovereign immunity to suit and is immune to the Tribe's claims for damages. It also asserts the affirmative defenses of laches and statute of limitations, and further claims that if the Tribe ever had any

aboriginal right of possession to the subject lands, such right was extinguished long ago by the actions of the United States.

Plaintiff's (the Tribe's) Motion requests the Court to affirm its jurisdiction over EPCWID or to dismiss the case based on Eleventh Amendment immunity. The Tribe acknowledges that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, but claims it is not an alter-ego agency of the State (Original Complaint ¶5; First Amended Original Complaint ¶5.)

EPCWID urges that this action should be dismissed because, as a political subdivision operating •pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity.

Discussion

Is the Water District Entitled to Sovereign Immunity?

EPCWID asserts that the Tribe's claims are barred by the Eleventh Amendment to the United States Constitution, which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State. U.S. CONST. amend XI. Thus, a state is constitutionally immune from actions brought in federal courts by its own citizens or citizens of other states, unless it consents to be sued. *Hans v. Louisiana,* 134 U.S. 1, 3, 19 (1890); *Scott v. Board of Supervisors of La. State Univ.,* 336 F.2d 557, 558 (5th Cir. 1964); *Edelman v. Jordan,* 415 U.S. 651, 663 (1974); *Florida Dep't of States v.Treasure Salvors, Inc.,* 458 U.S. 670, 683 n.17 (1982); *In re State of New York,* 256 U.S. 490, 497 (1921). *See also Aerojet-General Corp. v. Askew,* 453 F.2d 819, 828 (5th Cir. 1971) (setting forth a two-pronged test for the existence of Eleventh Amendment immunity: (1) whether the action is against the state, and (2)

if so, whether the state consented to be sued in the federal courts), and *Voisin's Oyster House, Inc. v. Guidry,* 799 F.2d 183, 185-86 (5th Cir. 1986) (noting that Eleventh Amendment bars suits in federal court by citizens of a state against their own state or a state agency or department). Sovereign immunity of the Eleventh Amendment restricts suits against states by sovereigns as well as by individuals. *Monaco v. Mississippi,* 292 U.S. 313, 321-22, 330 (1933) (holding that a state, without consenting, may not be sued by its own citizens, foreign corporations, other states, or foreign states). Eleventh Amendment immunity also applies to a suit by an Indian tribe against a state. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991) (recognizing that Indian tribes enjoy immunity against suit by the states and vice versa); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028 (1997)(according Indian tribes the same status as foreign sovereigns and recognizing that sovereign immunity restricts suits by sovereigns against sovereigns). Plaintiff concedes in its pleadings that the Ysleta del Sur Pueblo is a federally recognized Indian tribe. (Original Complaint ¶4; First Amended Original Complaint ¶4). The Tribe and a fortiorari its members are therefore subject to Eleventh Amendment immunity. *Coeur d'Alene Tribe,* 117 S.Ct. at 2033-34.

A State can waive its sovereign immunity and consent to being sued. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984), citing *Clark v. Barnard,* 108 U.S. 436, 447 (1883); *Coeur d'Alene Tribe,* 117 S.Ct. at 2033. The State's consent, however, must be unequivocally expressed. *Pennhurst,* 465 U.S. at 99, citing *Edelman v. Jordan,* 415 U.S. 651, 673 (1974); *Papasan v. Allain,* 478 U.S. 265, 276 n.10 (1986). Absent such waiver, neither a state or agencies acting under its control are subject to suit in federal court. *Sherwinski v. Peterson,* 98 F.3d 849, 851 (5th Cir. 1996), citing *Puerto Rico Aquaduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993).

A clear showing of congressional purpose is required to abrogate Eleventh Amendment immunity, such as enactment of a federal statute that explicitly and on its face indicates an intent to sweep away the immunity of the States or that has a history which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. *Quern v. Jordan,* 440 U.S. 332, 343-45 (1979) (holding that 42 U.S.C. § 1983 does not override state's Eleventh Amendment immunity). *See also Pennhurst,* 465 U.S. at 99, quoting *Quern,* 440 U.S. at 342 (requiring an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States" in the context of civil rights legislation and the Fourteenth Amendment). In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, the Court will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman,* 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In *Idaho v. Coeur d'Alene Tribe,* a federally recognized Indian tribe brought suit against the state and its officials and agencies, alleging an ongoing violation of its property rights in contravention of federal law. 521 U.S. 261, 117 S.Ct. 2028, 2040 (1997)[1]. Specifically, the Coeur d'Alene Tribe ("CDA

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[1] The Coeur d'Alene Tribe requested injunctive relief in *Idaho v. Coeur d'Alene Tribe,* seeking to invoke the *Ex parte Young* exception to the Eleventh Amendment bar. 117 S.Ct. at 2043. In *Ex Parte Young,* the Supreme Court recognized an exception to a state's Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. 117 S.Ct. at 2030; *Ex Parte Young,* 209 U.S. 123 (1908). While the Supreme Court did find the *Young* doctrine applicable, it allowed claims for declaratory and injunctive relief to proceed only insofar as they sought to preclude ongoing violations of federal law. *Id.* Because the Ysleta del Sur Pueblo Tribe did not include

Tribe") claimed ownership in the submerged lands and bed of Coeur d'Alene Lake and various of its navigable tributaries and effluents lying within the original boundaries of the Coeur d'Alene Reservation. *Id.* at 2030-32. In the alternative, the CDA Tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title. *Id.* at 2032. The Coeur d' Alene Tribe asked the Court to declare that the disputed lands were for the exclusive use, occupancy and enjoyment of the tribe and to invalidate all statutes and regulations purporting to regulate the lands. *Id.* The Court found that the CDA Tribe's suit was the functional equivalent of a quiet title action which implicates special sovereignty interests. *Id.* at 2040. As such, the CDA Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent, because the Eleventh Amendment would bar it. *Id.* Although the relief requested is not as extensive, the nature of suit in the instant case is strikingly similar to that of the *Coeur d'Alene* suit: the Ysleta del Sur Pueblo seeks to establish its rightful title to certain property within the Ysleta and Socorro Grants and to exclude EPCWID from possession. On these facts, the instant suit too is the functional equivalent of a quiet title action, and thus cannot be maintained in federal court without the consent of the State of Texas. *See id.* To hold otherwise would allow the federal court to summon a state before it in a private action seeking to divest the state of a property interest, a power clearly beyond the Court's authority to act. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982).

The instant case is a property rights suit seeking relief in the form of ejectment and damages resulting from trespass. The federal statutes implicated include the Indian Non-

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state officers as defendants, the *Ex Parte Young* exception has no application in the instant case.

Intercourse Act and any treaties which may have been codified. State statutes at issue include various Relinquishment Acts. Neither party has cited any evidence of Congressional or state legislative intent to abrogate Eleventh Amendment immunity in these particular acts of legislation. Likewise, neither party has established by state statute or otherwise that either the State of Texas or its agent El Paso County Water Improvement District No. 1 consented to be sued. Consequently, the Eleventh Amendment bars the Tribe's claim in federal court against the State of Texas.

Having determined that the Tribe's claim is barred by the Eleventh Amendment if asserted against the State, the question that remains is whether the State of Texas is the real party in interest in this suit brought against EPCWID. The nature of the suit as one against the State is to be determined by the essential nature and effect of the proceeding. *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945). The Fifth Circuit Court of Appeals has taken a case-by-case approach to determining whether a State is the real party in interest in suits brought against entities which appear to be alter egos of the State. *Richardson v. Southern Univ.*, 118 F.3d 450 (5th Cir. 1997). "A federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself.' " *Id.*, citing *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 874 (5th Cir.), in turn quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)), *cert. denied*, 502 U.S. 866 (1991). *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (finding school board was more like county or city than it was like arm of state, and it therefore was not entitled to assert Eleventh Amendment immunity where, under state law, "state" did not include "political subdivisions" and "political subdivisions" did include local school district); *Sessions v. Rusk State Hospital*,

648 F.2d 1066, 1069 (5th Cir. 1981) (concluding that Rusk State Hospital is an arm of the state for Eleventh Amendment purposes because it is a state institution under exclusive control of Texas Department of Mental Health and Mental Retardation). The Fifth Circuit identifies six factors that guide its determination of whether a particular entity is an arm of the State:[2]

(1) whether the state statutes and case law characterize the agency as an arm of the state;

(2) the source of the funds for the entity;

(3) the degree of local autonomy the entity enjoys;

(4) whether the entity is concerned primarily with local, as opposed to state-wide problems;

(5) whether the entity has authority to sue and be sued in its own name; and

(6) whether the entity has the right to hold and use property.

Delahoussaye v. City of New Iberia, 937 F.2d 144, 147 (5th Cir.1991), citing *Minton v. St. Bernard Parish School Bd.,* 803 F.2d 129, 131 (5th Cir.1986) (footnote omitted) (quoting *Clark v. Tarrant County,* 798 F.2d 736, 744 (5th Cir.1986)). Applying this test in *Delahoussaye,* a state university was

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[2] This "test" is identical to the test applied by the Fifth Circuit in diversity jurisdiction case law, to determine whether a governmental body could be considered a "citizen" or alter ego of a state. *Richardson,* 118 F.2d at 452 n.8, citing *PYCA Indus., Inc. v. Harrison County Waste Water Management Dist.,* 81 F.3d 1412, 1416 n.2 (5th Cir.1996) (" '[T]he analysis of an [entity's] status is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity purposes.' " (quoting *Tradigrain, Inc. v. Mississippi State Port Auth.,* 701 F.2d 1131, 1132 (5th Cir. 1983)).

determined to be an arm of the State and thus entitled to Eleventh Amendment immunity. *Delahoussaye,* 937 F.2d at 147. Similarly in *Richardson,* a state university and its board of supervisors were entitled to sovereign immunity in an action by a student, as the state was the real party in interest. *Richardson,* 118 F.3d at 456. In applying the *Delahoussaye* factors to the Greater New Orleans Express Commission ("GNOEC"), however, the Court concluded that the GNOEC was not an arm of the state and, therefore, was not shielded by the state's Eleventh Amendment immunity. *Pendergrass v. Greater New Orleans Express Comm'n,* 144 F.3d 342, 343 (5th Cir.1998). *See also McDonald v. Board of Miss. Levee Comm'rs,* 832 F.2d 901 (5th Cir.1987) (finding that Board of Mississippi Land Commissioners was not arm of state and was not entitled to Eleventh Amendment immunity, even though its existence was mandated by State Constitution).

The fact that EPCWID may be cloaked with some indicia of state power may not be sufficient to immunize it from suit in federal court. The United States Supreme Court has consistently refused to construe the Eleventh Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' *Lake Country Estates v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 400-01 (1979). A county does not occupy the same position as a state for purposes of the Eleventh Amendment; a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. *Edelman,* 415 U.S. at 667 n.12 (1974). In examining EPCWID to determine whether the suit is in reality a suit against the state itself, EPCWID may nevertheless qualify for sovereign immunity if the state is a necessary party to the suit. *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n,* 762 F.2d 435, 438 (5th Cir. 1985).

Jacintoport predates *Delahoussaye* and *Clark* (on which *Delahoussaye* is based), and sets forth the Fifth Circuit's multi-factor test to determine immunity under the Eleventh Amendment. *Id.* at 438-40, 442. *Clark* adopts the *Jacintoport* factors. The *Delahoussaye* factors are essentially identical to the *Jacintoport* factors, although *Delahoussaye* does not directly cite *Jacintoport.* In *Jacintoport,* the factor that "subsumes all others" is the treatment of the entity in state courts. *Id.* at 438, citing *Huber, Hunt & Nichols v. Architectural Stone Co.,* 625 F.2d 22, 25 (1980). Other factors comprising the Fifth Circuit's test for Eleventh Amendment immunity in *Jacintoport* include:

(1) financial independence, that is, whether the judgment will be satisfied by the entity's funds or by state appropriations, and other aspects of financial autonomy such as the extent of the state's liability for the entity's general debts and obligations (as opposed to liability for a judgment);

(2) the entity's degree of local autonomy and control, and most importantly, whether the funds to defray any award would be derived from the state treasury, including an analysis of the extent of the entity's independent management authority;

(3) whether the agency has express authority to sue and be sued in its corporate name;

(4) whether the agency has been granted the right to hold and use property; and

(5) whether the agency is primarily concerned with local, as opposed to statewide, problems.

Jacintoport, 762 F.2d at 438-40, 442 (citations omitted). In a typical situation, some of these factors will point to immunity, while others will just as strongly suggest that the entity is an independent political subdivision not entitled to

immunity. *Id.* at 442, citing *Tradigrain,* 701 F.2d at 1133. The Court "must never, however, lose sight of the primary question involved: whether the state is the real party in interest in the lawsuit nominally brought against the agency". *Id.*

Several years after the *Jacintoport* decision and without considering factors similar to those in *Jacintoport,* the Texas Supreme Court reached the conclusion that the Port of Houston Authority is a political subdivision of the State that is protected by governmental immunity except to the extent that it has been waived. *Guillory v. Port of Houston Auth.,* 845 S.W.2d 812, 813 (Texas 1993). The *Guillory* court reasoned that governmental units created under article XVI, section 59 of the Texas Constitution are entirely governmental in function. *Id.* at 814. The Court affirmed the Texas Court of Appeals' holding that a navigation district like the Port Authority is such a political subdivision, which can act only in a governmental capacity and not in a proprietary capacity. *Id.* at 813. The *Guillory* Court further stated that "[w]ater improvement districts . . . created under [article XVI, section 59] are created by the Legislature for general public purposes" and that immunity is applied on the basis of creation of the governmental unit. *Id.* at 814. This decision was consistent with the Fifth Circuit's ruling in *Kamani v. Port of Houston Auth.,* 702 F.2d 612, 613 (5th Cir. 1983), which classified the Port of Houston Authority as "a creature of state law and a political subdivision of the State of Texas," entitling it to Eleventh Amendment sovereign immunity from a maritime tort claim.

Nine years after the Fifth Circuit's *Jacintoport* decision, the United States Supreme Court declined to find the Port Authority Trans-Hudson ("PATH") entitled to Eleventh Amendment immunity in a suit by injured railroad workers against PATH, seeking recovery under Federal Employers' Liability Act (FELA). *Hess v. Port Auth. Trans-Hudson*

Corp., 513 U.S. 30, 50 (1994). The Court first determined that there was no genuine threat to the dignity of New York or New Jersey in allowing the workers to pursue FELA claims in federal court. It then focused on determining whether there was good reason to believe the states and Congress designed the Port Authority to enjoy Eleventh Amendment immunity. *Id.* at 46. The Court recognized that the impetus for the Eleventh Amendment is the prevention of federal court judgments that must be paid out of a State's treasury. *Id.* The Court went on to state that the proper focus of an Eleventh Amendment inquiry is on losses and debts. *Id.* at 51. If the State is not obligated to bear and pay the resulting indebtedness of the enterprise when expenditures of the enterprise exceed receipts, then the Eleventh Amendment's core concern is not implicated. *Id.*

One year after *Hess* was decided, the Fifth Circuit reverted again to its *Kamani* analysis, finding the Port of Corpus Christi Authority legally and factually indistinguishable from the Port Authority of Houston ("a creature of state law and a political subdivision of the State of Texas" entitled to Eleventh Amendment immunity). *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995). The Court reasoned that, because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* did not overrule *Kamani* or control the disposition of the case. *Id.*

Fortunately, the Fifth Circuit's apparent "bright-line" test established in *Pillsbury* makes it unnecessary for this Court to engage in either the *Delahoussaye/Jacintoport* or the *Hess* analyses to determine whether EPCWID is an entity whose nexus with the state entitles it to assert sovereign immunity. As helpfully referenced in EPCWID's Response, the history and nature of EPCWID are summarized as follows:

> The plaintiff District was established in 1917 under the authority of a Texas Statute. Later it was converted into

> a conservation and reclamation district under the Constitution of Texas, Vernon's Ann. St. Const. Tex. art. 16, [section] 59, but without any change of name. Under the statute it has a broad right of eminent domain 'and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated, beyond the boundary of such districts and in any county within the State of Texas', and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
>
> It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas.

El Paso County Water Improvement District No. 1 v. City of El Paso, 133 F. Supp. 894, 914 (D.C. 1955), *reformed in part on other grounds and aff'd in part*, 243 F.2d 927, *cert. denied*, 355 U.S. 820 (1957). As earlier stated, Plaintiff (the Tribe) acknowledges in its Amended (and Original) Complaint that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Texas State Constitution. The Court will therefore apply the *Kamani/Guillory/Pillsbury* approach regarding entities created under Article XVI, section 59 of the Constitution of the State of Texas in this case. Thus, EPCWID is entitled to Eleventh Amendment immunity by virtue of how it was created and is operated.

Eleventh Amendment sovereign immunity deprives a federal court of jurisdiction to hear a suit against a state. *Warnock v. Pecos County, Tex.*, 88 F.3d 341 (5th Cir. 1996), citing *Pennhurst State School and Hosp. v. Halderman*, 465

U.S. 89, 100 (1984). Because this Court has no jurisdiction to decide the Tribe's claim, it must be dismissed.

Finding *Pillsbury* wholly dispositive, the Court declines to reach the issue of whether either the *Hess* analysis or the six-factor balancing test set forth in *Jacintoport* and *Delahoussaye* results in a finding of sovereign immunity.

Conclusion

Because El Paso County Water Improvement District No. 1 was created and still operates pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity under the Eleventh Amendment. Therefore, this action should properly be dismissed because this Court lacks jurisdiction to entertain the Ysleta del Sur Pueblo's claim. Accordingly,

IT IS ORDERED that Plaintiffs' Complaint be DISMISSED for lack of jurisdiction. Costs are assessed against Plaintiff.

All other pending motions are DENIED AS MOOT.

SIGNED this 13th day of November, 1998.

/s/ Lucius D. Bunton, III
LUCIUS D. BUNTON, III
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Apr. 10, 2000]

No. 98-51203
Summary Calendar

D.C. Docket No. P-98-CV-27

YSLETA DEL SUR PUEBLO
Plaintiff-Appellant

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1
Defendant-Appellee

SOUTHWESTERN BELL TELEPHONE COMPANY
Not Party

Appeal from the United States District Court for the Western District of Texas, Pecos.

Before POLITZ, WIENER, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: May 2, 2000.

A True Copy
Test

Clerk, U.S. Court of Appeals, Fifth Circuit
By: /s/ Shari Stevenson
Deputy
New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Apr. 10, 2000]

No. 98-51203

(Summary Calendar)

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellant,

Versus

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
Defendant-Appellee.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Not Party.

Appeal from the United States District Court
For the Western District of Texas
USDC No. P-98-CV-27

Before POLITZ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant The Yselta Del Sur Pueblo ("Pueblo") appeals the district court's dismissal of its complaint against the El Paso County Water Improvement District No. 1 ("District") for lack of jurisdiction. The Pueblo argues that 1) the district court erred in determining that the District is the

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

alter ago of the State of Texas and therefore immune to suit pursuant to the Eleventh Amendment, 2) Congress abrogated the State's Eleventh Amendment immunity in the Indian Non-Intercourse Act, 25 U.S.C. § 177, and 3) the State, by transacting in the Pueblo's lands, constructively waived Eleventh Amendment immunity by engaging in an activity regulated by Congress. Southwestern Bell Telephone Company ("Southwestern Bell") has filed a motion for leave to file an amicus brief out of time, which the District opposes.

We find that Southwestern Bell's motion is untimely, that the issue Southwestern Bell seeks to address has been adequately briefed by the Pueblo and the District, and that granting Southwestern Bell's motion would result in the needless delay of this case's disposition. *See* Fed. R. App. P. 29. Accordingly, Southwestern Bell's motion is denied.

We have reviewed the record and briefs submitted by the parties and find that the Pueblo's arguments lack merit. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 286-88 (5th Cir. 2000); *Pillsbury Co., Inc. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983).

AFFIRMED.

(2)

No. 00-0054

Supreme Court, U.S.
FILED
SEP 13 2000
CLERK

IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 00-0054

YSLETA DEL SUR PUEBLO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Pueblo filed its Petition for Certiorari on July 10, 2000. In its petition, the Pueblo indicated that neither the November 13, 1988 order of the United States District Court for the Western District of Texas dismissing the case on Eleventh Amendment grounds, nor the April 10, 2000 opinion of the Court of Appeals affirming the dismissal were reported. A footnote to the per curiam opinion indicated that the Court of Appeals for the Fifth Circuit determined that the "opinion should not be pub-

lished and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."

The cited rule generally provides that unpublished opinions are not precedent:

> Unpublished opinions . . . are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).

On May 2, 2000, mandate issued in the appeal.

Fifteen days later in the case *Southwestern Bell Telephone Company v. City of El Paso and El Paso County Water Improvement District No. 1*, United States District Court for the Western District of Texas, El Paso Division, Civil Action No. EP-98-CA -114-EP, Judge Prado signed and entered an order which held that the Eleventh Amendment does not bar suit against the District because it is not an arm of the state.[1] Appendix at A1. The District's appeal was docketed by the Fifth Circuit on June 15, 2000 in Docket No. 00-50485.

The Fifth Circuit strives to maintain comity among panels, with subsequent panels bound by decisions of prior panels. *Macktal v. U.S. Dep't of Labor*, 171 F. 3d 323, 328 (5th Cir. 1999). Pursuant to Rule 47.5.4, however, the panel deciding the Eleventh Amendment issue in *Southwestern Bell* is not bound by the unpublished opinions of prior panels. On July 31, 2000, the Water District requested that the Publication Committee of the Fifth Circuit publish the opinion of April 10, 2000, without informing the Court that the pending *Southwestern Bell* appeal involved the same issue. Appendix at B1. The Court has de-

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[1] Judge Prado's holding is contrary to that of Judge Bunton of the same district in the underlying suit made the subject of the Pueblo's Petition for Certiorari.

cided to publish the opinion giving it precedential effect. Appendix at C1.

The precedential effect of the Fifth Circuit's decision establishes a dispositive, "bright-line" test for determining whether an entity is an arm of the state and thus entitled to Eleventh Amendment protection: It is if the state says so. Absent areas of Congressional abrogation, the Fifth Circuit's decision empowers a state to extend Eleventh Amendment protection to all political subdivisions within the state simply upon the state's say so.

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

[Filed May 22, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. EP-98-CA-114-EP

SOUTHWESTERN BELL TELEPHONE COMPANY,
Plaintiff,

vs.

CITY OF EL PASO AND EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
Defendant.

ORDER

On this date the Court considered El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment, filed December 1, 1999 and Southwestern Bell's Response. El Paso County Water Improvement District 1's letter briefs have also been considered. Also on this date, the Court considered Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1, as well as the response to that motion. After careful consideration, the Court will deny the motion to dismiss and will deny the conditional motion as moot.

Background and Procedural History

Southwestern Bell Telephone Company ("SWBT"), a provider of telecommunications services holding a certificate of convenience and necessity issued by the Public Utility Commission of Texas ("PUC"), brought this suit for declaratory and injunctive relief originally against the City of El Paso ("City"). In its original petition, SWBT sought declarations that (1) a pro-

posed city ordinance that would require SWBT to pay the City 5% of all gross revenues from services to customers within El Paso violated the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., ("FTA"); (2) certain buyout provisions of a then-current ordinance as well as the proposed ordinance also violated the FTA; (3) the proposed ordinance violated the Texas Public Utilities Regulations Act, Title II of the Texas Utilities Code, ("PURA"); (4) the buy-out provisions violated Article 1416 of the Texas Revised Civil Statutes; (5) no SWBT property would be subject to the buyout provisions; and (6) the buy-out provision is unenforceable.

El Paso County Water Improvement District No. 1 ("District") was added as a Defendant in SWBT's First Amended Complaint. The District is a water improvement district operating under Article XVI, Section 59 of the Texas Constitution. At the center of the controversy between SWBT and the District is a series of irrigation ditches deeded from the federal Bureau of Reclamation to the District in January 1996. Development in the area of the ditches has resulted in an increase in demand for telephone service.

The District has established certain application procedures for entities wanting to cross the canals, laterals and ditches. These procedures require an entity, such as SWBT, to complete an application, pay an application fee of $500 and obtain a survey. Before the survey is ordered, the District's Board of Directors must preliminarily approve the application. After the survey is completed, the Board assesses a charge, which can be determined on an ad hoc basis, based on the length of the crossing.

In its claims against the District, SWBT seeks declaratory relief, arguing that (1) the District's application procedures and fees violate both FTA and PURA; (2) roads and highways crossing the District's ditches and canals are public roadways; (3) the District has no right to charge for telephone lines crossing its canals and ditches when those lines are within the right-of-way

of city or county roads; (4) the water flowing through the District's canals and ditches is public; and (5) the District has no right to charge for telephone lines crossing public waters. The District filed its counterclaim, alleging that SWBT has trespassed on its property, or alternatively, that SWBT has taken its property for public use without compensating the District.

SWBT and the City have settled their claims, leaving the District as the only defendant remaining in the case.

Standards for Eleventh Amendment Immunity

The District moves to dismiss this case on the basis that it is barred by the Eleventh Amendment. In the absence of valid Congressional abrogation or state consent, the Eleventh Amendment prohibits a plaintiff from suing a state in federal court. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2223 (1999).

The District argues that it is a branch of the state and is, therefore, immune from suit. SWBT argues that the District is more like a municipality, county or a school district, none of which are protected by Eleventh Amendment immunity, *Hess v. Port Authority Tans-Hudson Corp.*, 513 U.S. 30, 47 (1994); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1997).

In Clark v. Tarrant County, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit established a six-factor test for determining whether an entity is a branch of the state for purposes of the Eleventh Amendment. These factors are:

1.) Whether the state statutes and case law view the agency as an arm of the state;

2.) The source of the entity's funding;

3.) The entity's degree of local autonomy;

4.) Whether the entity is concerned primarily with local, as opposed to statewide, problems;

5.) Whether the entity has the authority to sue and be sued in its own name; and

6.) Whether the entity has the right to hold and use property.

Hudson v. City of New Orleans, 174 F.3d 677, 679 (5th Cir. 1999). *See also Clark,* 798 F.2d at 744-45

However, there is another line of Fifth Circuit case law on this subject to which the District directs the Court's attention. In this line of cases, port authorities, which also operate under Article XVI, Section 59 of the Texas Constitution, are held to be immune arms of the state. *Pillsbury Co., Inc. v. Port of Corpus Christi Auth,* 66 F.3d 103, 104 (5th Cir. 1995); *Kamant v. Port Houston Auth* 702 F.2d 612 (5th Cir 1983).

The District argues that, based on these cases, the Fifth Circuit has created a bright-line test for entitles organized and operated under Article XVI, Section 59 of the Texas Constitution, and that an examination of the *Clark* factors would be inappropriate. Particularly, the District points to language in *Pillsbury* emphasizing the creation of the port authority pursuant to Article XVI, Section 59 of the Texas Constitution. *Pillsbury*, 66 F.3d at 104-05.

The Court is convinced that the language in *Pillsbury* does not have the broad significance that the District would attribute to it. The basis for the Fifth Circuit's decision in *Pillsbury* is that the Port of Corpus Christ Authority is factually and legally indistinguishable from the Port of Houston Authority, which the court in *Kamani* had previously held immune from suit under the Eleventh Amendment. *Pillsbury,* 66 F.3d at 104. Therefore, *Pillsbury* was essentially decided on the basis of stare decisis.

Kamani, too, was decided on the basis of a previous case, *McCrea v. Harris County Houston Ship Channel Navigation Dist.,* 423 F.2d 605 (5th Cir. 1970). The court in *Kamani,* in holding the Houston port immune from suit, cited *McCrea's* statement that the Port of Houston Authority was "a creature of

state law and a political subdivision of the State of Texas." *Kamani*, 702 F.2d at 613. In *McCrea*, the issue of whether the Houston port was an arm of the state for Eleventh Amendment purposes was never raised; rather, the court was describing the Harris County Houston Ship Channel Navigation Distict. *McCrea*, 423 F.2d at 607. Therefore, neither *Kamani* nor *McCrea* hold that an entity created and run under Article XVI, Section 59 of the Texas Constitution is automatically protected by the Eleventh Amendment.

Further, the context of the statement in *Pillsbury* indicates that the Fifth Circuit did not intend to create a bright-line test for Eleventh Amendment immunity. The plaintiff in *Pillsbury* had argued that Supreme Court case *Hess v. Port Authority Trans-Hudson Corp.*,513 U.S. 30 (1994), overruled *Kamani*. In *Hess*, the Supreme Court held that a bi-state railroad created by an interstate compact was not subject to Eleventh Amendment immunity. *Hess*, 513 U.S. at 38, The *Pillsbury* court distinguished the analysis in *Hess* by stating:

> We view *Hess* as a limited holding addressing the standard to be applied to bi-state entites not created pursuant to state statute. Because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* does not overrule *Kamani* or control the disposition of this appeal.

Pillsbury, 66 F.3d at 104-05.

Thus in context, the court in *Pillsbury* is not indicating that there should be a bright line rule-that everything created pursuant to a particular section in the Texas Constitution is entitled to immunity-but is instead distinguishing the facts before it from the facts before the Supreme Court in *Hess*.[1]

---

[1] *Cf Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir. 1996)("analogies between like entitles cannot replace consideration of the six relevant factors"); *Lafe v.R.E. Thomason Gen. Hosp.*, 665 F 2d 724, 727 (5th

Therefore, the Court will examine the six *Clark* factors to determine the status of the District.

The six factors

The six *Clark* factors are not given equal weight, and it is common for several of the factors to weigh in favor of viewing the entity as an arm of the state and for several to weigh against it. *Hudson,* 174 F.3d at 682-83.

The source of the District's funding

Of the six *Clark* factors, the source of the entity's funding has been held to be the most important. *Hudson,* 174 F.3d at 679; *Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147 (5th Cir.1991). This is essentially a question of whether the state would be liable for a judgment against the entity, *See Regents of the Univ. of Cal. v. Doe,* 519 U.S. 425, 430 (1997). The Court notes that SWBT is not seeking any monetary damages from the District.

The Distict is funded by local user fees (assessments), local taxes and bonds. *See* Tex. Water Code §49.107 (authorizing a district to levy and collect taxes for operation and maintenance); *Id.* at § 55.354 (assessments); *Id* at § 55.491 (authorizing bond election); *Id* at §55.491 (amount of the bonds should be suffcient to pay for proposed improvements); *Id* at § 55.651 *et seq.* (levying taxes to pay principal and interest on bonds).

More importantly, it appears that the District itself , and not the state, is reasonable for any judgments against it. *Harris County Flood Control Dist. v. Mihelich,* 528 S.W.2d 506 (Tex 1975); Op. Att'y Gen No. H-1111, 1978 WL 24366 (Jan 6, 1978)(both stating that a judgment against distict operating pur-

---

Cir. 1982)("[a] federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself").

suant to Article XVI, Section 59 of the Texas Constitution should be paid from the district's maintenance fund). *See* also Tex, Water Code § 49.066(b)(a state court rendering judgment against a district may order the district to collect taxes to pay the judgment). Therefore, a judgment against the Distict would not be paid from the state treasury.

How state law views the District

Although not binding on the Court, whether state law views the entity as an alter ego of the state is relevant to the determination of Eleventh Amendment immunity. The Texas Supreme Court has held that political subdivisions created by the Texas Legislature under article XVI, section 59 of the Texas Constitution are immune from suit in Texas courts *Guillory v. Port of Houston Auth*, 845 S.W.2d 812, 812 (Tex 1993). Although the entity at issue in *Guillory* was port authority, the Texas court stated that "[w]ater improvement districts . . . are different from municipalities in that the former are created by the Legislature for general public purposes, while the latter are created by consent of their inhabitants." *Guillory,* 845 SW.2d at 814.

The Texas Supreme Court also stated that the Houston Port Authority was immmune from federal suit, based on *Kamani. Guillory*, 845 S.W. 2d a at 815. Because the same port authority was involved in both *Kamani* and *Guillory,* these statements do not persuade the Court that the District is immune under the Eleventh Amendment.

The district's degree of local autonomy

The Distict is run by a Board of Dirctors consisting of five locally elected directors who own land within the District. Tex. Water Code §§ 55.101; 55.102. The Board of Directors is permitted to purchase or make improvements and facilities for irrigation without state approval. *Id.* at § 55.163. Likewise, the District is authorized to enter into contracts with the United States without state approval. *Id.* at § 55.185. The District can also set its own fees, sell its property and annex land. *Id.* at §§49.212,

49.226, 49.301-.302. On the other hand, before a district can issue bonds to fund a project, the project must be approved by the Texas Natural Resource Conservation Commission. *Id.* at § 49.181. Nevertheless, on the whole, the District appears to have a significant amount of local autonomy.

Whether the district is concerned primarily with local, as opposed to statewide, problems

Although the use of water is of concern to the entire state of Texas, the District's powers appear limited to address issues of local concern The Court notes the Texas Supreme Court's statement that entities created under Article XVI, Section 59 of the Texas Constitution are for "general public purposes." *Guillory*, 845 S.W. 2d at 814. Nevertheless, on the whole, it appears that the District is primarily concerned with the area within the District itself. The purposes of a water improvement district are:

> (a) to provide for irrigation of land within its boundaries.
>
> (b) to furnish water for domestic power, and commercial purposes.
>
> (c) to cooperate with the United States under federal reclamation laws for the purpose of construction, operation and maintenance of irrigation and drainage facilities necessary to maintain the land's irrgabitily and to assume debts to the United States on account of district lands

See Tex. Water Code § 55.161.

These purposes strongly suggest that the District is primarily concerned with local problems.

Whether the enity has the right to sue and be sued in its own name & whether the entiy has the right to hold and use property

These two factors are frequently considered to be the least important. *See Hudson*, 174 F.3d at 682. A water district is per-

mitted to sue in its own name. *See* Tex. Water Code § 49.066(a)(a district, including a water improvement district, may sue and be sued); *Id.* at § 55.504 (before selling bonds, a water improvement district is to bring suit in district court); *City of Pelly v. Harris County Water Control and Improvement Dist. No 7*, 195 S.W.2d 241 (Tex. Civ. App.—Galveston 1946)(rev'd on other grounds).

Likewise , a water distinct can acquire property. Tex. Water Code § 49.218 ; *See also Id.* at 49.222 (eminent domain); *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955) (the District has "a broad right of eminent domain").

Motion to Substitute Plaintiffs

In light of the Court's decision, it is unnecessary to decide whether SWBT could substitute the District's directors as defendants. The Court notes, however, that *Ex Parte Young* permits suit for prospective declaratory or injunctive relief against a state officer in his or her official capacity. *Edelman v. Jordan*, 415 U.S 651 (1974); Ex Parte Young, 209 U.S. 123 (1908). Based on the nature of the suit and the prospective relief sought in this case, the *Ex Parte Young* doctrine would seem applicable. Therefore, if the District were considered an arm of the state for Eleventh Amendment purposes, the suit would be permitted to go forward by substituting Directors of the District for the District itself.

Conclusion

ACCORDINGLY, it is ORDERED that El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment (Docket No. 49) is DENIED. It is also ORDERED that Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1 (Docket No. 55) is DENIED AS MOOT.

SIGNED and ENTERED this 17th day of May, 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

[Received Aug. 1, 2000]

James M. Speer, Jr.
Attorney at Law
300 E. Main Street
Suite 1440
El Paso, Texas 79001

July 31, 2000

Via Federal Express
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Attention: Publication Committee

Re: Ysleta del Sur Pueblo v. El Paso County Water Improvement Districrt No. 1
No. 98-51203; D.C. Docket No. P-98-CV-27

Dear Court of Appeals:

I represent El Paso County Water Improvement District No. 1, and I am an attorney of record in the above action. On April 10, 2000 the Court of Appeals for the Fifth Circuit issued an important opinion in such action.

The opinion has not been published. Enclosed is a copy of the opinion.

The Plaintiff/Appellant, Ysleta del Sur Pueblo, has recently filed a petition for writ of certiorari.

Although the opinion is brief, the law set forth applies to all political subdivisions of the State of Texas existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas. Among such political subdivisions are Water Control

and Improvement Districts, Underground Water Conservation Districts, Fresh Water Supply Districts, Municipal Utility Districts, Water Improvement Districts, Drainage Districts, Levee Improvement Districts, Irrigation Districts, and Navigation Districts.

Today I received a telephone call about the opinion from an attorney representing the Metropolitan Water District of Southern California. Also enclosed is a copy of an article from the June 2000 edition of Western Water Law which discusses opinion.

On behalf of El Paso County Water Improvement District No. 1, I respectfully request that you publish the opinion. I submit that there is so much interest in this opinion that it needs to be published.

Thank you for your consideration.

Yours very truly,
/s/ James M. Speer, Jr.
JAMES M. SPEER, JR.

Cc: Ronald Jackson
Attorney for Plaintiff/Appellant
w/enclosures

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Charles R. Fulbruge III
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

August 9, 2000

TO ALL COUNSEL:

No. 98-51203–Pueblo v El Paso City Water
(D.C. No. P-98-CV-27)

Please be advised that the court has decided to publish the Opinion in the above entitled and numbered cause.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Joseph Armato
JOSEPH ARMATO
Deputy Clerk

Enclosures:

Honorable Lucius D. Bunton, III
Mr. Glenn Jarvis
Mr. Ronald Lee Jackson
Mr.Scott Warren Johnson
Mr. James M. Speer